(3)

No. 87-1363

In The

Supreme Court of the United States

October Term, 1987

JOHN J. KELLY, Chief State's Attorney,
LESTER J. FORST, Commissioner of Public Safety,

v. *Petitioners,*

BILL WILKINSON,
JAMES FARRANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF IN OPPOSITION

MATTHEW HOROWITZ
SHELLY WHITE
Connecticut Civil Liberties Union Foundation
32 Grand Street
Hartford, Connecticut 06106
(203) 247-9823

JOHN A. POWELL
STEVEN R. SHAPIRO
(Counsel of Record)
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court and the Court of Appeals erred in determining that an indiscriminate policy of mass frisks at political rallies violates the Fourth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES–(Continued)

OPINIONS BELOW

The opinions below are reproduced in the Appendix to the Certiorari Petition with the exception of the first reported decision of the District Court (hereafter referred to as "Wilkinson I"), which is reported at 591 F. Supp. 403 (D. Conn. 1984).

STATEMENT OF THE CASE

Petitioners' statement of the case obscures the critical findings in this case. Those findings by the District Court, which were substantially affirmed by the Court of Appeals, amply support the ruling below. They demonstrate, as well, the factual nature of this dispute and the inappropriateness of plenary review by the Court.

The relevant portions of the record may be briefly summarized:

1. Between September 18, 1980 and April 30, 1984, the Ku Klux Klan (hereafter "the Klan") conducted sixteen rallies on public and private property in Connecticut. (Appendix to Certiorari Petition, hereafter "A." 5a).

2. The purpose of these rallies was to communicate the Klan's purposes, goals, and ideas to the public, and to recruit new members. *Id.* Several rallies concerned specific themes, such as support for local police, opposition to communism, support for nuclear submarines and opposition to integration. *Id.*

3. The Klan did not initiate or participate in any violence at any of its Connecticut rallies. (A. 10a-11a).

To the contrary, petitioners have consistently stated that their concern about violence was prompted by the actions and threats of anti Klan demonstrators. *Id.*

4. In response to this concern, petitioners initiated a policy of indiscriminate frisks at Klan rallies. (A. 7a).[1] The frisks were highly intrusive. (A. 9a-10a). Many went well beyond a routine pat-down of the outer clothing. (A. 8a). At some rallies, individuals were required to roll up their pants, remove their shoes, empty their pockets, and reveal the contents of their wallets. *Id.*

5. Numerous people were discouraged from attending Klan rallies in Connecticut by petitioners' policy of indiscriminate frisks. (A. 9a-10a). For example, at one rally in Meriden, Connecticut, police observed several hundred people leave the rally site rather than subject themselves to a police frisk. (Exhibits, hereafter "Ex." 118, 128, 140). The frisk policy was designed, in part, to achieve this result. (Ex. 55, 73 at 21)(Transcript, hereafter "Tr." 1664-65).

6. The District Court found that order can be maintained at Connecticut Klan rallies without the need to frisk each person in attendance. (A. 12a-13a). The trial record is unequivocal that police agencies in other jurisdictions regularly maintain order at political events posing comparable or greater security threats

---

[1] These frisks were purportedly based on fourteen state court orders obtained by the police prior to scheduled rallies. (A. 6a). None of the court orders set any limits on the items that could be seized. (A. 9a).

without resort to mass frisking. (Tr. 85-86, 90-93, 99-103, 113, 163-64, 297, 1056-58). There was no evidence offered at trial that mass searches of persons and cars have been used elsewhere in this country to control crowds at political demonstrations. *Id.* Confidential documents from the Connecticut State Police Department (CSPD) reflect that CSPD has studied the police response to Klan rallies in other jurisdictions and has conceded that "a high police profile was effective in keeping opposing groups of demonstrators under control with a minimum of injuries." (Ex. 55, 76, 106).

7. The District Court found that the police response to the first three Klan rallies was woefully inadequate, i.e., insufficient number of police officers, inadequate deployment of officers, and a lack of separation between Klan supporters and anti-Klan demonstrators. (A. 11a-12a) The problems in maintaining order at the first three rallies were the direct result of bad police work. *Id.* For example, at the second Klan rally in Connecticut, fifty police officers were assigned to control a crowd of twenty-one Klan members and 1,500 to 2,000 demonstrators. (A. 11a). Injuries occurred at the first three rallies notwithstanding mass searching at two of these rallies. (A. 12a). CSPD officers have candidly acknowledged the initial deficiencies, explaining that they had had no previous experience or training in maintaining order at such demonstrations and that the early rallies were learning experiences. (A. 12a)(Tr. 877-79, 1053-54, 1064-67, 1082-83, 1111-13, 1132-33, 1529, 1607, 1662-64, 1695).

8. The District Court found that police performance improved markedly at the thirteen subsequent

rallies. (A. 12a). Order was successfully maintained at these rallies because the police effectively implemented traditional crowd control tactics; i.e., a large and visible police presence and the separation of opposing groups. (A. 12a).

9. The District Court found that the weapons used by anti-Klan demonstrators at the three initial Klan rallies were fists, rocks, bottles and sticks. (A. 10a) The injuries suffered at these rallies were essentially such as would be sustained in a fight. (Stipulations hereafter "Stip." 9k, 10h, 11h) (Tr. 175-176, 819, 1052-53, 1062-63). The reference in the Certiorari Petition to "liquid bottle bombs, fiberglass knives, plastic grenades, and other plastic explosives" is a pure fiction. (Certiorari Petition, hereafter "Pet." 11). There is no suggestion in the trial record that any person who has or might attend a Klan rally in Connecticut has brought such items to a rally, has contemplated the use of such items, or has access to such items.

10. There were no explicit, neutral criteria to guide police discretion as to whether to conduct mass searches, the intensity of the searches, and the items that warranted confiscation. (A. 8a-9a). As a result, the record is replete with examples of arbitrary police conduct. *Id.* For example, police used magnetometer searches at some rallies and frisks at other rallies for no apparent reason. (A. 8a-9a). At some rallies, certain persons were searched and certain persons were frisked by magnetometer for no reason. (Tr. 37, 761-62, 273-75)(Ex, 226). At several rallies, persons were frisked more than once for no reason. (A. 8a). At some rallies, police dismantled cars, searching under the

hoods and inside passenger compartments, glove compartments, trunks, air filters and hubcaps. (A. 9a)(Tr. 601-602). Moreover, the items that were confiscated at rally sites ranged from rocks, knives, and baseball bats to cameras, credit cards, change purses and an apple. (A. 9a).

REASONS FOR DENYING THE WRIT

1. Petitioners Do Not Challenge the Legal Conclusions of the Court Below; Instead They Seek a Redetermination of the Facts.

This case does not present any dispute concerning legal principles. The governing Fourth Amendment standards have been well settled by this Court, were properly identified by both courts below, and are accepted by petitioners. Petitioners' grievance is with the factual findings of the District Court. However, this Court does not sit as a "super trial court" to review findings of fact, particularly where those findings were substantially affirmed by the Court of Appeals.

The "*central teaching of . . . Fourth Amendment jurisprudence*" is that privacy intrusions cannot be tolerated in the absence of objective evidence that a particular person is engaged in wrongdoing. *United States v. Cortez,* 449 U.S. 411, 418 (1981) (emphasis in original), *citing Terry v. Ohio,* 392 U.S. 1, 21, n. 18 (1968). *See also Ybarra v. Illinois,* 444 U.S. 85, 91-96 (1979). It is well-settled under the Fourth Amendment that a search conducted without a warrant issued upon probable cause is "*per se* unreasonable . . . subject only to a

few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) *citing Katz v. United States,* 389 U.S. 347, 357 (1967).

These exceptions are properly limited in scope and this Court has been openly reluctant to expand them. *United States v. Chadwick,* 443 U.S. 1 (1977); *United States v. Ramsey,* 431 U.S. 606 (1977). This Court recently stated that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other safeguards' are available 'to assure the individual's reasonable expectation of privacy is not subject to the discretion of the officer in the field.' " *New Jersey v. T.L.O.,* 469 U.S. 325, 342, n. 8 (1985), *citing Delaware v. Prouse,* 440 U.S. 648, 654-55 (1979).

This Court has assessed whether suspicionless search schemes satisfy the test of reasonableness under the Fourth Amendment by "balancing . . . the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). *See Tennessee v. Garner,* 471 U.S. 1, 7-8 (1985). The factors that a court must consider in undertaking this inquiry include "the scope of the particular intrusion, the manner in which it is conducted, the justification for initating it, and the place in which it is conducted." *Bell v. Wolfish, supra,* 441 U.S. at 559.

The District Court correctly applied the *Wolfish* test in assessing the mass frisk scheme. The District Court found, as a matter of fact, that order can be

maintained at Klan rallies without the need to conduct mass frisks. (A. 12a-13a). The Court of Appeals carefully reviewed the trial record and concluded that this finding was not clearly erroneous. (A. 59a-60a, n. 14, 62a). The District Court also found that mass frisks of all persons attending political rallies constitute a substantial intrusion on individual privacy rights. (A. 16a-18a). Again, the Court of Appeals determined that this finding was not clearly erroneous. (A. 56a, 58a-60a). The intrusiveness of the mass frisk scheme is also substantiated by the case law which reflects that no court has ever held that a person other than a convict may be subjected to a search as intrusive as a frisk in the absence of individualized suspicion. (A. 17a).[2]

Contrary to petitioners' suggestion, the lower courts struck a careful accommodation between security needs and individual privacy rights; an accommodation which accounts for every plausible threat to public safety at Klan rallies. Pursuant to the decision below, police agencies may separate opposing political groups beyond a throwing distance, thereby precluding fist fights within the rally site and deterring the throwing of projectiles. The possession of firearms may be declared illegal and persons may be frisked where there

---

[2] *Compare Delaware v. Prouse, supra,* 440 U.S. 648 (approving car stops); *United States v. Albarado,* 495 F.2d 799 (2d Cir. 1974) (approving magnetometer searches) *with United States v. Ortiz,* 422 U.S. 891 (1975) (invalidating mass car searches); *Ringe v. Romero,* 624 F.Supp. 417 (W.D. La. 1985) (invaliding mass frisks).

is individualized suspicion of illegal possession.[3] All persons attending the rally may be searched by a metal detector where there is specific evidence that a rally will be attended by an opposition group that has historically clashed with the rally sponsor and there is specific evidence of a likelihood of violence, thereby eliminating the possibility that firearms or knives could be present within a rally site.[4]

Given the wealth of evidence supporting this careful judicial balance, the decision below could only be reversed by an act of *de novo,* appellate fact finding.[5] This Court has repeatedly eschewed that role.

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts . . . would very likely contribute only negligibly to the accuracy of fact determination at a

---

[3] Plaintiffs did not challenge the legality and appropriateness of a ban on weapons at any time in this litigation.

[4] The balance struck by the lower courts reflects careful consideration for the precedential implications of sanctioning a mass frisk scheme. If the courts were to approve mass frisks at a political rally despite a finding that such searches were unnecessary for purposes of maintaining public safety, mass frisk schemes would proliferate at political rallies given that the risk of violence at such events is often significant. (A. 11a) (Tr. 85-86, 90-93, 99-103, 113, 163-164, 297).

[5] In resolving credibility issues, the District Court was privy to live testimony and to police video tapes of the significant Klan rallies.

> huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade . . . more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road'. . . ."

Anderson v. City of Bessemer City, 470 U.S. 564, 574-85 (1985). *See Goodman v. Lukens Steel Co.,* 107 S.Ct. 2617, 2623 (1987) ("A Court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error . . . Unless there are one or more errors of law inhering in the judgment below . . . , we should affirm it.").[6]

---

[6] Petitioners argue that the lower courts did not accord sufficient deference to the views of state police officers. (Pet. at p. 12, n.7) This claim is without foundation for several reasons.

> 1. In finding that mass frisks were not needed to maintain order, the trial court relied heavily on the testimony of certain state police officers who were field commanders and intelligence operatives at Klan rallies. (A. 12a). These officers acknowledged that the violence at the initial rallies was a function of police tactical

(Continued on following page)

Petitioners claim that certiorari is warranted because they have identified a novel law enforcement problem that is without guidance from the law or from the literature and practice of police science. Nothing is further from reality. The Court of Appeals decision authorizing metal detectors removes firearms and knives as issues. What remains for this Court's consideration are fists, sticks, and stones. Unfortunately, there is a long history in this country of the use of such instrumentalities at political rallies. There was detailed testimony at trial concerning the clashes of opposing groups at rallies in Washington, D.C. relating to the Camp David accords, the overthrow of the Shah of Iran, and the taking of American hostages by Iran. (Tr. 90-93, 99-103, 163-64). The memories of anti-Vietnam War demonstrations, civil rights marches in the

---

(Continued from previous page)

errors. (Tr. 877-79, 1053-54, 1064-67, 1082-83, 1111-13, 1132-33, 1529, 1607, 1662-64, 1695.) They attributed these errors to a lack of prior training and experience. *Id.*

2. In determining that the availability of metal detectors obviated the need for mass frisks, the Court of Appeals relied on the fact that police agencies in Connecticut had unilaterally decided to use metal detectors in lieu of mass frisks at two rallies and that these rallies were conducted without incident. (A. at 47a, 60a.).

3. The trial record includes internal police documents which reflect the views of state police officers that order had been successfully maintained at out of state Klan rallies by the use of traditional police tactics and without resort to mass searching. (Ex. 55, 76, 106).

South, and labor strikes are etched in our collective consciousness. The trial record is unambiguous that law enforcement agencies have developed extensive and effective methodologies for responding to fists, sticks, and rocks at such events.[7] None of these time-proven approaches contemplates massive intrusions into free speech and privacy rights.

This case does not raise any legal issue for this Court to resolve, let alone a "novel" legal issue. Accordingly, the petition for certiorari should be denied.[8]

---

[7] The Certiorari Petition erroneously claims that the Court of Appeals did not consider the security risks posed by rocks, sticks and bottles. (Pet. 14). To the contrary, the Court of Appeals stated that these threats can be adequately addressed by traditional crowd control techniques; i.e., "adequate police, separation of hostile groups, site selection, and preparation, etc." (A. at 62a).

[8] Petitioners imply that there is a conflict between the Federal Courts on the one hand, and certain Connecticut State Courts, on the other hand, as evidenced by the twelve court orders purporting to authorize mass frisks. (Pet. 12). The notion of a conflict is illusory. Only in regard to one court order, Stratford, did a state court address any of the constitutional issues posed at bar. (Ex. 131). The fact that First and Fourth Amendment issues were not decided in the state courts reflects Petitioners' decisions to wait until the last minute before a rally to file their state court suits. (A. 6a). *See Wilkinson I, supra,* 591 F. Supp. at 412, n. 10. As the District Court noted, the resulting lack of notice precluded Defendants from challenging these court orders on constitional grounds or, for that matter, on any grounds. *Id.* at 412. Moreover, as with all of the state court proceedings, the testimony of the state police officers at the Stratford hearing

(Continued on following page)

2. Petitioners' Version of a First and Fourth Amendment Nexus is Contrary, On Its Face, to the Values Underlying the First and Fourth Amendments and Therefore Does Not Warrant Plenary Consideration.

Petitioners contend that mass frisks at rallies would provide enhanced security and thereby promote free speech rights (Pet. 9-12). Petitioners' thesis finds no support in the trial record and is at war with the history and objectives underlying the First and Fourth Amendments.

Both in England and this country, the power to search has historically been used as a means of suppressing unpopular speech. *See Entick v. Carrington,* 19 How. St. Tr. 1029 (1765); *Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763). *E.g., Marcus v. Search Warrants,* 367 U.S. 717 (1961) (use of search and seize power to seize allegedly "obscene" materials); *United States v. McSurely,* 473 F. 2d 1178 (D.C. Cir. 1972)(use of search and seizure power to suppress political dissent); *Manfredoni v. Barry,* 401 F. Supp. 762 (E.D.N.Y. 1975) (same); *Lykken v. Vavreck,* 366 F. Supp. 585 (D. Minn. 1973) (same); *Farber v. Rizzo,* 363 F. Supp. 386 (E.D.

(Continued from previous page)

deviated substantially from the police documents and the police testimony that are part of the record in the case at bar. (Tr. 132-34, 195-96, 813-19, 1110-13). For instance, police witnesses never informed the state courts that faulty police work had been employed at the rallies where there was violence. *Id.* The record at bar also differs from those in the state courts given the opportunity in this case to elicit expert testimony and to secure police documents and videotapes through discovery.

Pa. 1973) ((same). *See also Boyd v. United States,* 116 U.S. 616 (1886). As this Court has stated:

> "Historically, the struggle for freedom of speech and press in England was bound up with the issue of the search and seizure power." *Marcus v. Search Warrants,* 367 U.S. 717, 724 (1961). History abundantly documents the tendency of Government–however, benevolent and benign its motives–to view with suspiciion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs . . . The price of public dissent must not be a dread of subjection to an unchecked surveillance power.

United States v. United States District Court, 407 U.S. 297, 313-14 (1972).

The trial record substantiates the Court's traditional concern. The District Court found that large numbers of persons who had traveled to Klan rally sites had decided not to attend the rallies rather than be subjected to frisks. (A. 9a-10a). One police officer observed "several hundred persons leave [a] rally site rather than be subjected to a frisk". (Ex. 118, 128, 149). Confidential state police documents reflect that a prime purpose of the mass frisks was to deter persons from attending the Klan rallies. (Ex. 55, 73 at p. 21) (Tr. 1664-65).

Under Petitioners' logic, any intrusive law enforcement tactic which enhanced security at a potentially volatile political demonstration would automatically be valid, regardless of its impact on First Amendment

Rights. Because virtually any intrusive police technique will in fact add to security, Petitioners' thesis is nothing more than the equivalent of stating that First Amendment protection should not apply to public protests and demonstrations. It does not warrant plenary consideration by this Court.[9]

---

[9] Petitioners seek exemption from traditional First and Fourth Amendment doctrines by invoking the labels "administrative searches" and "voluntary searches". Petitioners claim that because the mass frisks are not intended to investigate crime, they are "administrative" and should be subjected to a lesser standard of scrutiny. This Court has repeatedly rejected this claim, noting that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *New Jersey v. TLO, supra,* 469 U.S. at 335, quoting, *Camara v. Municipal Court, supra,* 387 U.S. at 530. *See Delaware v. Prouse, supra,* 440 U.S. at 662. *See also* the District Court's analysis at A. 22a-24a.

Petitioners label the mass frisks as "voluntary" because persons can leave the rally site rather than undergo a search. As a price for this so-called "voluntary" choice, persons must forfeit their First Amendment right to attend a political gathering. It has long been settled that government may not condition access to a gratuitous privilege, let alone to a constitutional right, upon the sacrifice of another constitutional right. *Frost v. Railroad Commission,* 271 U.S. 583, 593-94 (1926). *See e.g., Perry v. Sindermann,* 408 U.S. 593, 598 (1972); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Blackburn v. Snow,* 771 F. 2d 556, 567-69 (1st Cir. 1985); *United States v. Albarado, supra,* 495 F. 2d at 806-807.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

MATTHEW HOROWITZ
SHELLY WHITE
Connecticut Civil Liberties
Union Foundation
32 Grand Street
Hartford, Connecticut 06106
(203) 247-9823

JOHN A. POWELL
STEVEN R. SHAPIRO
(Counsel of Record)
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800